FILE COPY.

FILED
FEB 18 1905
JAMES H. MCKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 15, Original.

EX PARTE: IN RE THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER.

BRIEF FOR JOHN B. COTTON IN OPPOSITION TO THE PETITION FOR WRITS OF PROHIBITION, MANDAMUS, AND CERTIORARI.

FREDERIC D. MCKENNEY,
JOHN S. FLANNERY,
WILLIAM HITZ,
WILLIAM FRYE WHITE,
Attorneys for ~~John B. Cotton~~ Respondents

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 14633

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 15, Original.

EX PARTE: IN RE THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER.

Brief for John B. Cotton in Opposition to the Petition for Writs of Prohibition, Mandamus, and Certiorari.

STATEMENT OF FACTS.

This is an application by the Commonwealth of Massachusetts for a writ of prohibition and the correlative writs of mandamus and certiorari to the justices of the supreme court of the District of Columbia to restrain them from taking further proceedings or entertaining jurisdiction in a certain equity suit pending in said court wherein John B. Cotton is complainant and Leslie M. Shaw, Secretary of the Treasury, and John L. Bates, then governor of the Commonwealth of Massachusetts, are defendants.

The suit below grows out of a controversy which has arisen from the employment of said Cotton by the State of Massachusetts to prosecute and recover a claim which it had against the United States for expenses incurred in arming and equipping troops employed in the War of the Rebellion,

By an act of the Congress of the United States approved July 27, 1861 (12 Stats. L., 276), it was provided:

> "That the Secretary of the Treasury be, and he is hereby, directed, out of any money in the Treasury not otherwise appropriated, *to pay to the governor of any State, or to his duly authorized agent*, the cost, charges and expenses properly incurred by such State for enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting its troops employed in aiding to suppress the present insurrection against the United States, to be settled upon proper vouchers, to be filed and passed upon by the proper accounting officers of the Treasury."

On March 20, 1888, the legislature of Massachusetts passed the following resolution authorizing the employment of an agent to represent the Commonwealth in the prosecution of its war claim against the United States:

> "*Resolved*, That the governor and council are hereby authorized to employ the agent of the Commonwealth for the prosecution of war claims against the United States, to prosecute also the claim of the Commonwealth for a refund of the direct tax paid under act of Congress approved August fifth, in the year eighteen hundred and sixty-one, and of the interest paid upon war loans during the period from eighteen hundred and sixty-one to eighteen hundred and sixty-five, *also to fix his compensation which shall be paid out of any amount received therefrom.*"
>
> Massachusetts Acts and Resolves, 1888, Resolve 39, p. 540.

Subsequently to the passage of this act of 1888, negotiations were opened with Mr. Cotton by the Commonwealth of

Massachusetts, through its then attorney general, Hon. Hosea M. Knowlton, with a view to employing him to conduct the prosecution of its war claims.

On July 12, 1899, the legislative council of the Commonwealth passed a resolution authorizing the attorney general to employ said Cotton to prosecute said claims, "the compensation for such employment not to exceed 10 per cent. of the amount collected" (Petition, 14–15).

Pursuant to this authority Hosea M. Knowlton, then attorney general, prepared a form of contract between the Commonwealth and said Cotton, and on July 15, 1899, transmitted duplicate originals thereof to Mr. Cotton for execution by him, and four days later forwarded the contract, as executed by Mr. Cotton, to Hon. Roger Wolcott, then governor of Massachusetts, for execution by him in behalf of the Commonwealth (Petition, 16–17).

The contract is set out in full in the bill filed in the court below and will be found in the petition, pp. 18–19.

Said contract bears date on the 18th of July, 1899, and the only portions thereof which are material in the consideration of this petition are the following:

> "Now, therefore, said Roger Wolcott, governor of the Commonwealth of Massachusetts, for and in consideration that said John B. Cotton has agreed to present, prosecute and endeavor to recover before the Court of Claims, the Supreme Court of the United States, and the Treasury Department of the United States, said claim of the Commonwealth of Massachusetts, has appointed and does hereby appoint said John B. Cotton *its agent and attorney* to present, prosecute and *recover* the claims as aforesaid on the terms and conditions hereinafter specified.

> "Said John B. Cotton agrees to prepare, present, prosecute and *endeavor to recover* before said Court of Claims, the Supreme Court of the United States, and the Treasury Department of the United States the claim aforesaid on behalf of said Commonwealth of Massachusetts at a compensation of 10 per centum *of the entire sum collected, payable* ONLY *out of any sums that may be collected hereunder*, and without any liability on behalf of said Commonwealth of Massachusetts for expenses incurred by said Cotton in the prosecution of said claim, etc."

Upon receipt of a duplicate original of said contract duly executed by the Commonwealth of Massachusetts, said Cotton deposited it with the Secretary of the Treasury of the United States as evidence of his right and authority to appear before that Department in the prosecution of said claim, and to recover the amount found to be due to the Commonwealth on account thereof.

Mr. Cotton at once entered upon the prosecution of the claim and devoted to it five years of continuous and arduous labor and attention until the claim was finally adjudicated, audited, and passed.

On or about May 2, 1904, the Treasury Department issued and delivered to him, as the duly authorized agent of the Commonwealth of Massachusetts, war settlement warrant, No. 11343, payable "to the governor of the State of Massachusetts, or order," for the sum of $1,611,740.85, and addressed "P. O. address, c/o John B. Cotton, *agent and att'y*, Washington, D. C." (Petition, 20).

At no time between the date of the execution of the contract and the date of the appropriation by Congress to pay

the claim was any dissatisfaction expressed with the provisions of said contract or with the manner in which Mr. Cotton had performed his services thereunder. It was only after Mr. Cotton's efforts had resulted in the adjudication of the claim and an appropriation by Congress for the claimant that former Governor Bates and the present attorney general of Massachusetts suddenly awoke to the fact that the amount of the compensation which he was entitled to receive under his contract with the Commonwealth was large.

No attempt was made by the Commonwealth to repudiate the contract which it had made or to cancel the power of attorney contained therein, and on May 2, 1904, when the warrant was actually delivered to Mr. Cotton as the agent of the Commonwealth, the contract containing the power of attorney was on file in the Treasury Department, unrevoked and uncanceled.

On May 6, 1904, Mr. Cotton notified Attorney General Parker that the warrant in question had been delivered to him, and received an acknowledgment of said notification from the attorney general, reading, "I have advised His Excellency, the Governor, of the receipt of your communication, and am requested by him to say to you that he awaits the immediate transmission of the warrant to him." On the 12th of May following Mr. Cotton replied to the attorney general, pointing out to him that he was entitled to a lien upon the warrant for the amount of his fees under his contract, and also mailed a copy of said letter to ex-Governor Bates (Petition, 22–28).

On the 14th of May he notified the Secretary of the Treasury that he claimed a lien for compensation upon the war-

rant in accordance with his contract with the Commonwealth (Petition, 32).

Having received a very evasive acknowledgment from the attorney general in reference to the position which the Commonwealth intended to assume in regard to its contract with him, Mr. Cotton on the 28th of May, 1904, addressed a further communication to the governor in which he said:

> "That there may be no possible misunderstanding of my position in this matter, I desire to say, what I think I have already said in substance, that I am now and always have been ready to deliver to Your Excellency the warrant now in my possession at any time when the Commonwealth is ready to pay me the fees to which justly and legally I believe I am entitled. And I desire further to say that if Your Excellency will appoint any reasonable time at which I may both deliver the warrant to you and receive my compensation of 10 per cent. thereof, I shall be glad to do so" (Petition, 33).

The receipt of this letter was acknowledged by the attorney general in a communication as evasive and noncommittal as his letter of May 16. This letter is couched in the most ambiguous language, and, while calling upon Mr. Cotton to perform his contract to the letter, it carefully refrains from even suggesting that the State intends to be bound by it in any particular.

Without making the slightest acknowledgment of Mr. Cotton's letter of May 28, containing a tender of the warrant and demand for his fees under his contract (except the indirect response of the attorney general just referred to), former Governor Bates, with an astuteness that might warm

the cockles of the heart of a modern politician, but which would hardly commend him to the favorable consideration of a court of equity, without notifying Mr. Cotton, addressed a communication to the Secretary of the Treasury under date of June 24, 1904, in which he demanded that payment upon the warrant already drawn be stopped, that the warrant itself be canceled, and that a duplicate thereof be forwarded to him as governor of the Commonwealth (Petition, 9).

The letter of the governor to the Secretary of the Treasury was equally as open and candid as his communication to Mr. Cotton. Instead of coming out frankly and saying that the State did not consider that it was bound by its contract with Mr. Cotton, or that the latter had no authority to receive and the Secretary of the Treasury no power to issue the warrant to Mr. Cotton, he casts suspicion upon the conduct of Mr. Cotton and upon the validity of the action of the Department by saying, "I am further advised that such warrant was delivered by the Treasury Department of the United States to John B. Cotton, Esquire, of Washington, *representing himself to be the agent and attorney of this Commonwealth.*"

This demand of Governor Bates met with the terse, pointed, and vigorous rejoinder from the Secretary which it merited (Petition, 9–10). The Secretary's letter concludes as follows:

> "The situation then appears to be as follows: The agent of the Commonwealth of Massachusetts holds in his possession a warrant payable only on the governor's endorsement, which he now refuses to surrender. Being authorized to recover, the delivery of the warrant to the regularly constituted agent of the

> Commonwealth appears to be regular and fully authorized. Being thus regular and authorized, and the warrant unlost, as I am now advised, I see no excuse or justification for issuing a duplicate. If I am in error in my analysis I shall be very glad to hear from you."

Upon the 15th of July following, ex-Governor Bates asked that the matter of his request for the issuance of a duplicate warrant be referred to the Attorney General for his opinion. This was done, and the Attorney General some time in the latter part of November, 1904, gave the Secretary of the Treasury an opinion in writing, which opinion is not set out in the record.

Thereupon Mr. Cotton filed a bill in the supreme court of the District of Columbia against "Leslie M. Shaw, Secretary of the Treasury, and John L. Bates, governor of the Commonwealth of Massachusetts," in which he asserted his right to an attorney's lien upon the papers of his client, the Commonwealth of Massachusetts, including the warrant in question, and prayed, among other things, that said Leslie M. Shaw might be restrained and enjoined from canceling the warrant which had been delivered to him, and from drawing or issuing a duplicate thereof to said Bates, and "that the defendant, John L. Bates, may be restrained and enjoined from asking, demanding or receiving from the defendant, Leslie M. Shaw, or any of his assistants, subordinates or clerks, a second or duplicate warrant as aforesaid."

The State of Massachusetts was not named as a party to this suit, and no relief was prayed against the State.

Upon the filing of this bill, the Honorable Ashley M. Gould, one of the justices of the supreme court of the Dis-

trict of Columbia, issued a rule directed to the defendant, Leslie M. Shaw, Secretary of the Treasury, *alone*, requiring him to show cause on or before the 22d day of November, 1904, why the relief prayed as against him should not be granted. This rule was regularly served, and a true copy thereof is attached to the answer of the chief justice and associate justices of the supreme court of the District of Columbia as Exhibit "A."

The cause, owing to the illness of the leading counsel for Mr. Cotton, and by agreement with counsel for the Government, has not yet come on for hearing in the court below.

It will be seen from the copy of the docket entries (Answer to Rule, Exhibit B) that no service of process upon said Bates has been attempted, nor has any pleading been filed by him or by the State of Massachusetts in the cause.

POINTS AND AUTHORITIES.

While the petition of the Commonwealth of Massachusetts prays that writs of prohibition, mandamus, and certiorari may be issued to the judges of the supreme court of the District of Columbia, a consideration of the right of the Commonwealth to the writ of prohibition will necessarily dispose of its right to the other extraordinary writs mentioned.

We submit that the application of the Commonwealth for the writ of prohibition must be denied for the following reasons:

1. This court has no power to issue a writ of prohibition to the judges of the supreme court of the District of Columbia.

2. The application for the writ has been prematurely made, the petitioner not having appeared in the court below and filed a plea to the jurisdiction.

3. The petitioner has failed to show that if the writ of prohibition should not be granted it would result in an injury for which no other adequate remedy exists.

4. The State of Massachusetts is neither an actual party to the suit nor a necessary party thereto. The proceeding below is in the nature of an action *in rem* to establish an attorney's lien upon a valuable paper—the warrant—which in due course of employment was regularly delivered to Mr. Cotton as the agent and attorney of the Commonwealth duly authorized to receive it.

5. The State has not been made a party by the joinder as a defendant of Bates, its former governor. Mr. Bates was joined to prevent him as an individual from attempting to commit an act, or from procuring the commitment of an act, which would have destroyed a vested right acquired by Mr. Cotton under a contract with the State, and which entitled him to retain possession of said warrant as security for the payment of his fee.

6. If the joinder of former Governor Bates can be regarded as making the State a party defendant, then the suit has abated in respect of the State by the expiration of Mr. Bates' term as governor, and the suit cannot be revived against his successor in office.

7. The State has not been made a party by the joinder of the defendant Shaw as Secretary of the Treasury. Secretary

Shaw was made a defendant in his individual capacity to prevent him from attempting to do, at the request of former Governor Bates, an unlawful ministerial act, namely, the issuing and delivering to said Bates of a new warrant, which would have destroyed Mr. Cotton's lien upon the warrant which had already been lawfully and regularly issued and delivered to him as the agent and attorney of the Commonwealth.

8. If it should be considered that the effort to establish a lien upon the warrant, and to enjoin the threatened action of the Secretary of the Treasury in issuing a new warrant, makes the proceeding in effect a suit against the State of Massachusetts, then we submit that the cause falls within a well-established exception to the general rule prohibiting actions by an individual against a sovereign State, which exception provides that where property belonging to a sovereign comes within the control of a court without its compulsory process, either by the voluntary act of the sovereign or by the voluntary act of an individual having lawful possession of said property and asserting a right therein as against the sovereign, such court has jurisdiction to determine the rights of the parties in respect to such property.

I.

THE POWER OF THIS COURT TO ISSUE THE WRIT.

The only questions before this court upon this petition for a writ of prohibition are (1) the power of this court to issue the writ of prohibition and (2) the jurisdiction of the supreme

court of the District of Columbia over the cause. There can be no investigation or inquiry touching the merits of the action.

> High on Extraordinary Legal Remedies, 3d ed., sec. 767*b*.

a. This court derives its statutory power to issue the writ of prohibition from section 688 of the Revised Statutes of the United States, which authorizes the issuance of the writ to the district courts of the United States when proceeding as courts of admiralty and maritime jurisdiction, and from section 716 of the Revised Statutes of the United States (brought forward from sec. 14 of the Judiciary Act of 1789), which provides:

> "The supreme court and the circuit and district courts shall have power to issue writs of *scire facias*, and they shall also have the power to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law."

Under this section this court has held that it possesses the power to issue the writ of certiorari whenever the circumstances imperatively demand that form of interposition to correct excesses of jurisdiction and in furtherance of justice.

But this court has never so decided in reference to the writ of prohibition. On the contrary, in *Ex parte Gordon* (1 Black, 503, 506) Mr. Chief Justice Taney, in delivering the opinion of the court, said:

> "A prohibition cannot issue from this court in cases where there is no appellate power given by law, nor any special authority to issue the writ."

The same conclusion was reached in *Ex parte Christy* (3 Howard, 292), where a motion was made for a writ of prohibition to the district court of the United States for the district of Louisiana, to prohibit it from further proceeding in a bankruptcy case pending before it.

b. Since the passage of the act of February 9, 1893 (27 Stats., 434), establishing the Court of Appeals of the District of Columbia, this court—except, perhaps, in cases arising under the present bankruptcy law—cannot review the judgments and decrees of the supreme court of the District of Columbia until after they shall have been passed upon by said Court of Appeals. There is no right reserved to this court by statute to review the judgments or decrees of that court upon direct appeal or writ of error.

If the supreme court of the District of Columbia has jurisdiction of the cause, then the writ of prohibition cannot issue to that court, because such writ only issues to prevent an inferior court from attempting to exercise jurisdiction which it does not possess, or to prevent the excessive exercise of jurisdiction which it does possess.

If the supreme court of the District of Columbia has no jurisdiction over the cause, or if it has jurisdiction, but this court has not direct appellate jurisdiction to review its judgments or decrees, then before the writ of prohibition can issue this court must hold that it has *original* jurisdiction of the controversy.

Under article 3, section 2 of the Constitution this court is given original jurisdiction of all those cases in which a State shall be a party, which are enumerated in the first clause of

section 2, namely, in controversies between two or more States; between a State and the citizens of another State; between citizens of different States; between citizens of one State claiming lands under grants of different States, and between a State or citizens thereof and foreign States, citizens, or subjects.

By the 11th amendment to the Constitution the judicial power of this court over controversies in which a State is a party was modified so that it should not extend to "any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State."

Neither the provision of the Constitution conferring jurisdiction of controversies over States, nor the prohibition of the 11th amendment restricting that jurisdiction, can apply to the case at bar, because this is not a controversy between a State and a citizen of another State. The bill shows Mr. Cotton to be a citizen and resident of the District of Columbia, and this court has held that while the District of Columbia is a distinct political society or community, and therefore a State according to the definition of writers on general law, and should be so regarded for the purpose of construing and applying treaty stipulations (Geofroy *v.* Riggs, 133 U. S., 258, 269), yet it is not a State within the meaning of the constitutional provision just referred to, and that consequently a citizen of the District of Columbia cannot sue in the circuit court of the United States as a citizen of a State.

Hepburn *v.* Ellzey, 2 Cranch 445, 452 (op. by Ch. J. Marshall).

Metropolitan R. R. *v.* District of Columbia, 132 U. S. 1, 9.

In the case of *Hooe v. Jamieson* (166 U. S., 395), which was an action in ejectment brought in the circuit court of the United States for the western district of Wisconsin, by the complaint in which the plaintiffs in error alleged that they resided in and were citizens of the city of Washington, D. C., and that the defendants all resided in and were citizens of the State of Wisconsin, this court said:

> "We see no reason for arriving at any other conclusion than that announced by Chief Justice Marshall in *Hepburn v. Ellzey*, 2 Cranch, 445, February term, 1805, 'that the members of the American confederacy only are the States contemplated in the Constitution;' that the District of Columbia is not a State within the meaning of that instrument; and that the courts of the United States have no jurisdiction of cases between citizens of the District of Columbia and citizens of a State."

If the Court possesses no original jurisdiction over this controversy, it would seem to have no power to issue the writs of prohibition, certiorari, or mandamus prayed for by the petitioner, because under section 716 of the Revised Statutes the issuance of such writs is confined to those cases of which this court has either appellate or original jurisdiction. The provisions of section 716, being a re-enactment of section 14 of the Judiciary Act of 1789, were expressly referred to and reviewed in the opinions of Mr. Chief Justice Taney in *Ex parte Gordon* and of Mr. Justice Story in *Ex parte Christy, supra*, where the conclusion was reached that this court has no power to issue a writ of prohibition except in the cases expressly provided for by statute and in

those cases where it possesses the right of review upon appeal.

In his dissenting opinion in the Christy case Mr. Justice Catron said:

> "By the 14th section of the Judiciary Act this court has power to issue writs proper and necessary for the exercise of its jurisdiction; having no jurisdiction in any given case, it can issue no writ."

c. In this case the application has been prematurely made, the petitioner not having appeared in the court below and filed a plea to the jurisdiction.

> "Being an extraordinary writ, however, it (the writ of prohibition) issues only in cases of extreme necessity, and before it will be granted it must appear that the party aggrieved has applied in vain to the inferior tribunal for relief."
>
> High, Extraordinary Legal Remedies, sec. 765.
>
> Smith *v.* Whitney, 116 U. S., 167, 174.
>
> *Re* Huguley Mfg. Co., 184 U. S., 297.

It was remarked by Mr. Justice Gray in *Smith v. Whitney* (116 U. S., 173):

> "Where there is another legal remedy, by appeal or otherwise, or where the question of the jurisdiction of the court whose action is sought to be prohibited is doubtful or depends upon facts which are not made matters of record, or where a stranger, as he may in England, applies for the writ of prohibition, it may be said to be discretionary. But where that court has clearly no jurisdiction of the suit or prosecution instituted before it, *and the defendant has objected to its*

jurisdiction at the outset and *has no other remedy*, he is entitled to a writ of prohibition as a matter of right; and a refusal to grant it where all the proceedings appear of record may be reviewed in error."

d. The petitioner has failed to show that if the writ should not be granted it will result in an injury for which no other remedy exists.

> "Like all other extraordinary remedies, prohibition is granted only in cases where the usual and ordinary forms of remedy are insufficient to afford redress. And it is a principle of universal application and one which lies at the very foundation of the law of prohibition that the jurisdiction is strictly confined to cases where no other remedy exists, and it is always a sufficient reason for withholding the writ that the party aggrieved has another and complete remedy at law."
>
> High, *id.*, sec., 707.
> Smith *v.* Whitney, *supra.*
> *Re* Huguley Mfg. Co., *supra.*

The suit instituted by Mr. Cotton not being against the State of Massachusetts *eo nomini*, until that State appears in the court below and interposes a plea to the jurisdiction this court can not assume, upon the petition which has been filed here, that the proceeding below will result adversely to the interests of that State, or that it will injuriously affect her interests.

Nor can the State of Massachusetts successfully contend that it is remediless. It would be entirely in keeping with the dignity of that State if she would voluntarily waive all

technicalities and enter an appearance in the court below, which court has already acquired jurisdiction of the *res* and of two of the parties. In this proceeding, by filing a cross-bill, the State might, if it so desired, have a judicial construction of the contract which is the basis of this litigation and of the rights of the respective parties thereunder, and if the decision of the chancellor should be adverse to its claims, appeal to the Court of Appeals of the District of Columbia and finally to this court.

> "In all cases, therefore, where the party aggrieved may have ample remedy by an appeal from an order or judgment of the inferier court, prohibition will not lie, no such pressing necessity appearing in such case as to warrant the interposition of this extraordinary remedy, and the writ not being one of absolute right but resting largely in the sound discretion of the court."
>
> High, *id.*, sec. 771.

e. And, lastly, the writ must be denied, because the supreme court of the District of Columbia has jurisdiction of the cause.

II.

THE JURISDICTION OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

The fund of $1,611,740.85; the symbol representing that fund—the warrant; the principal defendant, the Secretary of the Treasury, and the complainant, John B. Cotton, are all within the jurisdiction of that court. The suit is in the nature of a proceeding *in rem* to establish an attorney's lien

for fees upon the warrant—a valuable paper of his client, which is in Mr. Cotton's possession; while it is also in the nature of a proceeding *in personam* directed against the defendant Shaw, as Secretary of the Treasury, and the defendant Bates, as governor of the State of Massachusetts, to have the former restrained from canceling the existing warrant and issuing a duplicate warrant in compliance with the request of said Bates, thus destroying the value of complainant's lien, and to have the latter enjoined from demanding or receiving such duplicate.

The contract in controversy is admitted to have been made with Mr. Cotton, and, so far as this proceeding is concerned, it must be conceded to be valid and binding upon the Commonwealth of Massachusetts. It must also be conceded that Mr. Cotton completed the services required of him under that contract by prosecuting the claim of the State against the United States to a successful issue. In the course of such service, and under the express authority contained in the contract, a valuable paper, *the Treasury warrant*, was regularly delivered to him by the Secretary of the Treasury.

Upon the delivery to Mr. Cotton of this paper it became impressed with a lien arising (1) from the contract of employment and (2) from *quantum meruit—i. e.*, for the value of the service rendered, irrespective of contract.

In re Paschal, 10 Wallace, 483.
McPherson *v.* Cox, 96 U. S., 404.
Wylie *v.* Coxe, 15 How., 415.

In McPherson *v.* Cox a contract had been made to pay to an attorney, for his services in suits concerning certain land, a specific sum of money out of the proceeds recovered. The

land having been recovered and sold by the owner for $38,000, a bond was taken and left with the attorney. A controversy having arisen between the client and the attorney as to the amount of the fee and the validity of the contract for services, this court, in an opinion by Mr. Justice Miller, held that the attorney was entitled to a lien on the bond for the money due him for his services under the contract, and also by reason of the relation of attorney. Upon this point the court says:

> " We are also of opinion that this obligation on the part of complainant to pay $5,000 to Carlisle and McPherson was, and is now, a lien on the bond in McPherson's possession. It is so by the express contract of the parties, as admitted by Mrs. Cox. It was to be paid out of the proceeds of the sale of the land recovered by the suit in equity in which they were employed. The first sale of the land was in a lump, and this bond for $38,000 represents the proceeds of that sale. It is the only proceeds of the sale. It is also a very fair inference, from the fact that the bond was left in McPherson's possession, that it was done as a recognition of the lien. There is no other reason why it should have been left with him. It was no part of his right or his duty as trustee to hold it. Its possession was in no way essential to any of the very few acts which, as trustee, McPherson could be called on to do under the deed of trust. It is, therefore, manifest that it was left with him as her attorney, or as a security for his debt. *It is none the less clear to us, that, apart from the express agreement for a lien, the same result follows from his relation to her as attorney, and the possession of this bond as a paper coming to him in the course of his employment in that character.* We have decided in the case of Paschal (10 Wall., 483), that an attorney has a

lien by law, under circumstances similar to these, for all that is due him as attorney or counsellor, on the papers of his client in his hands.

* * * * * * *

"We are, therefore, of opinion that McPherson has a right to the possession of the bond until the fee of $5,000 is paid, and that he has done nothing inconsistent with his duty as trustee under the deed of trust, nor displayed any hostile feeling to the real legal rights or interest of complainant, nor failed or neglected to perform any duty devolving on him as such trustee."

The lien claimed by Mr. Cotton grows out of his possession of the warrant and is inseparably connected with it. It constitutes a valuable right of property which would disappear should he surrender the possession of the warrant to the Commonwealth. It was only when this vested right in the subject-matter of the controversy was imperiled by Bates, the then governor of Massachusetts, demanding of the Secretary of the Treasury that he issue to him a second warrant and cancel the first, that Mr. Cotton was driven into court to protect his interests. The case therefore seems to come clearly within the principles established in the leading cases in this court of *Hans v. Louisiana* and *Pennoyer v. McConnaughy, post.*

The State is Not an Actual or Necessary Party.

The State of Massachusetts is not an indispensable party to the action sought to be stayed by the writ of prohibition, because the right asserted by the bill of complaint therein can be fully protected, and the situation sought to be reached

by aid thereof can be fully attained, even if the bill is dismissed as against the governor of Massachusetts and retained for adjudication as against the other defendant alone.

The right asserted by the bill of complaint is essentially a defensive right—the mere right of continuing an existing possession of *personal property*, and thereby preserving a lien thereon which has arisen both under a special contract and under the general right of an attorney or agent to a *quantum meruit* for services rendered and accepted.

The complainant merely seeks to maintain the *statu quo* in respect of a particular piece of personal property belonging to the State of Massachusetts, which, in the regular course of business, has come into his possession by virtue of a contract with the State and of services performed for the State, and which property the complainant offers to bring into court to abide the action of the court thereupon.

The complainant does not ask for any affirmative relief against the State of Massachusetts, nor for the specific performance of the State's contract with him, but only that an officer of the State may be enjoined from doing certain threatened acts which, if done, would invade his vested property rights, already acquired and possessed by virtue of his contract with the State.

The complainant recognizes the rule laid down by this court in *Hans v. Louisiana* (134 U. S., 1) and in *Pennoyer v. McConnaughy* (140 U. S., 1) as stating the present law regulating suits against States and the officers of States, and that in determining whether a particular suit is or is not in essence against a State the court will look behind the nominal parties to the record and into the merits of the controversy and the character of the relief sought.

In *Hans v. Louisiana* Mr. Justice Bradley, in delivering the opinion of the court, said:

> "To avoid misapprehension it may be proper to add that, although the obligations of the State rest for their performance upon its honor and good faith, and cannot be made the subjects of judicial cognizance unless the State consents to be sued or comes itself into court; yet where property or rights are enjoyed under a grant or contract made by a State, they cannot wantonly be invaded. Whilst the State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts, *may be judicially resisted*; and any law impairing the obligations of contracts under which such property or rights are held is void and powerless to affect their enjoyment."

The principle announced in Hans *v.* Louisiana has been so frequently reaffirmed by this court that it seems unnecessary to do more than refer to the cases in which the question has been raised.

Tyler case, 149 U. S., 191.

Reagan *v.* Farmers' Loan & Trust Co., 154 U. S., 388.

Belknap *v.* Schield, 161 U. S., 17.

Scott *v.* Donald, 165 U. S., 113.

Tindel *v.* Wesley, 167 U. S., 219.

Warner *v.* New Orleans, 167 U. S., 475.

Smythe *v.* Ames, 169 U. S., 519.

Fitts *v.* McGhee, 172 U. S., 529.

Illinois Central R. R. Co. *v.* Adams, 180 U. S., 28.

Missouri R. R. Co. *v.* Missouri R. Com'rs, 183 U. S., 53

International Postal Supply Co. *v.* Bruce, 194 U. S., 611.

The complainant Cotton has sought the protection of the doctrine laid down by this court in these cases. He asks no affirmative relief against the State and does not name it as a defendant; he does not seek to prevent the payment of any sum due the State; but on the contrary he has tendered himself as ready and willing to deliver to the State its property—the warrant—when his lien thereon has been secured or satisfied. When ex-Governor Bates, by his unlawful demand of Secretary Shaw, sought to invade Mr. Cotton's rights under his contract with the State and deprive him of his property in the warrant, he "*judicially resisted*" such unwarranted action by filing this bill for relief against the Governor and the Secretary.

In the Pennoyer case the principles of *Hans v. Louisiana* were quoted with approval and amplified as follows:

> "Little remains to be done or said by us in this connection, except to apply the principles announced in earlier cases to the case before us. It must be borne in mind that this suit is not nominally against the governor, secretary of state and treasurer, as such officers, but against them collectively, as a board of land commissioners.
>
> "It must also be observed that the plaintiff is not seeking any affirmative relief against the State or any of its officers. He is not asking that the State be compelled to issue patents to him for the land he claims to have purchased, nor is he seeking to compel the defendants to do and perform any acts in connection with the subject-matter of the controversy requisite to complete his title. All that he asks is that the defendants may be restrained and enjoined from doing certain acts which he alleges are in violation of his contract made with the State when h

purchased his lands. He merely asks that an injunction may issue against them to restrain them from acting under a State statute alleged to be unconstitutional, which act will be destructive of his rights and privileges, and will work irreparable damage and mischief to his property rights. The case cannot be distinguished in principle from Osborn & Bank and other cases cited, and the reasoning in those cases applies with equal force to this. * * *

"We think it clearly demonstrated from the authorities above referred to that the relief prayed can be granted, if, as contended, the legislation of the State under which the defendants are assuming to act is unconstitutional in that it operates to impair the obligation of a contract."

In the Pennoyer case the acts attempted or threatened by the State officers were justified by a claim of authority based upon *a statute*, but were enjoined because they invaded private rights and the authorizing statute was unconstitutional; but surely no other result could justly be reached in a case where the acts complained of equally invaded private rights under a claim of authority wrongly based upon the *common law*, or arbitrarily asserted without *any authority of law*.

The basis of right to an injunction in such cases is the illegal invasion of private right by a public officer under color of his office, and it can make no difference in principle whether he justifies his wrongful act under a special statute or under an unfounded claim of authority from the common law.

And if it be said that the Federal Constitution secures the citizen protection against *State statutes* impairing the

obligation of contracts, by a guarantee which does not extend to State action outside of an express statute, then it is equally true that by the 5th and 14th amendments to the Constitution it is ordained "that no person shall be deprived of life, liberty or property without due process of law," and this prohibition expressly extends to and includes the States.

Now, the complainant has a vested property right in the particular Treasury warrant, and the fund represented thereby, delivered to him as agent of the governor of Massachusetts by the Secretary of the Treasury, and his property right in that warrant consists of a lien thereon, attaching by virtue of his lawful possession thereof; and if, because of a controversy thereafter arising between the governor of Massachusetts and his agent, the complainant, the Secretary of the Treasury, destroys the value of that lien by the arbitrary issue and payment of a second warrant for the same debt, he thereby deprives the claimant of his property without due process of law.

If the Secretary of the Treasury or the governor of Massachusetts assumed to imprison the complainant under color of authority from his office, can it be doubted that the Federal courts could inquire into that imprisonment, and, if the same were found to be wrongful, release the complainant therefrom by a writ of *habeas corpus* based upon this very constitutional provision? And if this constitutional guarantee enables the courts to protect the *liberty* of the *citizen* from illegal acts of Government officers, does it not enable them to protect his property as well?

The suit is in the nature of a proceeding in rem against property under the control of the court below.

If it should be considered that the effort to establish a lien upon the warrant, and to enjoin the threatened action of the Secretary of the Treasury in issuing a new warrant renders this proceeding in effect a suit against the State of Massachusetts, then we submit that it falls within the well-established exception to the general rule prohibiting actions by an individual against a sovereign State, hereinafter set forth.

For while it is everywhere settled law that a sovereign cannot be sued in a court of justice without his consent, and that where you cannot sue a sovereign directly by a proceeding *in personam*, you cannot reach him indirectly by a proceeding *in rem*, there are various exceptions to this general principle, which are fully established by authority in this court and illustrated by numerous legal analogies.

Among these exceptions is the case arising when property belonging to a sovereign comes within control of the court without its compulsory preliminary process, either by the voluntary act of the sovereign or by the voluntary act of an individual having lawful possession of such property and asserting a right therein as against the sovereign. In such a case the court will perform its duty in respect of such property as if the owner thereof were suable. Similarly we find courts everywhere taking jurisdiction of all manner of controversies by virtue of having control of property belonging to persons over whom they have no control.

The most familiar examples of such jurisdiction are cases of ordinary attachment or condemnation of property, where the defect of personal jurisdiction is due to a physical fact,

as the non-residence of the defendant or the evasion of process by a resident defendant; but the same principle has been frequently applied in this court where the defect of personal jurisdiction is due to a legal doctrine, as the exemption of a sovereign from suit.

It is not contended for a moment that a bill of complaint, based on the contract between Mr. Cotton and the State of Massachusetts, would lie at the suit of Mr. Cotton against the State in any case where the compulsory preliminary process of the court was required against the officers of the State *in personam* or against the fruit of the contract *in rem*.

Such compulsory preliminary process cannot properly issue, but if, in the regular course of judicial administration the court acquires jurisdiction of the subject-matter in controversy, either *in personam* by the voluntary act of the sovereign defendant, or *quasi in rem* by the voluntary act of the plaintiff in bringing into court the property of the defendant lawfully in his possession, then the court will perform its duty in the premises and treat the sovereign, so far as such property is concerned, like any other party litigant.

So in the case of *Chamberlin vs. St. Paul Railroad Company*, 92 U. S., 306, this court, in passing upon a controversy involving the rights and remedies of an individual against a State, said:

> "When property passes to the State, subject to a specific lien or trust created by law or contract, such lien or trust may be enforced by the courts whenever the *property* comes under their jurisdiction and control."

And it would be difficult, indeed, to describe the exact situation now presented to the court more aptly or more concisely than is done by the above language of Mr. Justice Field.

And, again, in the case of *Christian v. Atlantic & N. C. Railroad Company*, 133 U. S., 244, this court while asserting the general rule

> " * * * that a bill will not lie to effect a foreclosure and sale, *or to obtain possession of property belonging to the State*; and for the very plain reason that, in such a case, the State is a necessary party and cannot be sued "—

yet the court also recognized the exception to the general rule upon which we are now relying, as follows (page 243):

> "There is a class of cases, undoubtedly, in which the interests of the State may be indirectly affected by a judicial proceeding without making it a party. Cases of this sort may arise in courts of equity where property *is brought under its jurisdiction for foreclosure or some other proceeding*, and the State, not having the title in fee *or the possession of the property*, has some lien upon it, or claim against it, as a judgment against the mortgagor, subsequent to the mortgage. In such a case the foreclosure and sale of the property will not be prevented by the interest which the State has in it; but its right of redemption will remain the same as before. Such cases do not affect the present, in which the object is to *take and appropriate* the State's property for the purpose of satisfying its obligations."

So, again, in the case of *Cunningham v. Macon & Brunswick Railroad Company*, 109 U. S., 451, the court, speaking through Mr. Justice Miller, says:

> "This principle is conceded in all the cases, and whenever it can be clearly seen that the State is an indispensable party to enable the court, according to

the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction. But in the desire to do that justice, which in many cases the courts can see will be defeated by an unwarranted extension of this principle, they have in some instances gone a long way in holding the State not to be a necessary party, though some interest of hers may be more or less affected by the decision. In many of these cases the action of the court has been based upon principles whose soundness cannot be disputed. A reference to a few of them may enlighten us in regard to the case now under consideration.

"It has been held in a class of cases where property of the State, or property in which the State has an interest, comes before the court and under its control, in the regular course of judicial administration, without being forcibly taken from the possession of the Government, the court will proceed to discharge its duty in regard to that property. And the State, if it choose to come in as plaintiff, as in prize cases, or to intervene in other cases when she may have a lien or other claim on the property, will be permitted to do so, but subject to the rule that her rights will receive the same consideration as any other party interested in the matter, and be subjected in like manner to the judgment of the court. Of this class are the cases of *The Siren*, 7 Wall., 152, 157; *The Davis*, 10 Wall., 15, 20; and *Clark v. Barnard* and others, 108 U. S."

The same principle is firmly established by numerous decisions of this court in admiralty cases bringing up for review proceedings *in rem* or *quasi in rem*.

So in the case of *The Siren*, referred to in *Cunningham v. Railroad Company, supra*, it is said that—

"A claim for damages *exists* against a vessel of the United States guilty of a maritime tort, as much as if the offending vessel belonged to a private citizen. And although the claim cannot be *enforced* either by direct suit against the United States or by direct proceeding *in rem* against the vessel, yet if the property itself against which the claim exists *gets within the control and jurisdiction* of the courts, through the act of the United States, then the claim against the same will be recognized and enforced."

* * * * * * *

"* * * the existence of a claim, and even of a lien upon property, is not always dependent upon the ability of the holder to enforce it by legal proceedings. A claim or lien existing and continuing will be enforced by the courts *whenever the property upon which it lies becomes subject to their jurisdiction and control.* Then the rights and interests of all parties will be respected and maintained."

The Siren, 7 Wall., at p. 158.

Approved in *Carr v. United States*, 98 U. S., at p. 438.

"The cases in which public property may be subjected to claims against it are those in which it is, by the act of the Government, in juridical possession, *or has become so without violating the possession of the Government*, and the latter seeks the aid of the court to establish or reclaim its rights therein. In such cases it is equitable that the prior rights of others to the same property should be adjudicated and allowed."

Carr v. United States, 98 U. S., 433.

Personal property of the United States on board of a vessel for transportation is liable to a lien for salvage services rendered in saving the property.

Such a lien cannot be enforced by a suit against the United States, nor by a proceeding *in rem when the possession of the property* can only be had by *taking it out of the actual possession of the officers or agents of the Government.*

But it may be enforced by a proceeding *in rem* when the process of the court does not disturb the possession of the Government, which, being thus compelled to appear in court to assert its claim, must discharge the lien before the property will be delivered to it.

Proceedings *in rem* to enforce a lien against property of the United States are only forbidden where, in order to sustain the proceeding, the possession of the United States must be invaded under process of the court.

The Davis, 10 Wall., 15.

United States v. Morgan, 99 Fed. Rep., 573.

> "In cases of general average, the master or owner of the ship has a lien upon all goods in the ship for a proportionate contribution toward the average.
>
> "There is no exception to this general rule in favor of the United States or any other government or sovereignty, although there may be cases of contract, where liens upon the property of governments do not attach, as on that of private persons.
>
> "Sovereignty does not necessarily imply an exemption of all the sovereign's property from the process and jurisdiction of courts of justice, and it is a fair inference from the duties of a sovereign, that where a lien exists upon property under general principles of justice, that lien should be presumed to be admitted and protected by every sovereign, until the presumption is repelled by some positive edict to the contrary. No such edict exists in the United States and I cannot but think that public policy will be promoted, and

not impugned, by holding that the remedy for the reward in general average is not uncertain and precarious, but attaches as a lien, primarily *in rem*, and does not await the slow, or tardy, or distant justice of the Government in awarding it."

Story, J., in *United States v. Wilder*, 3 Sumn., 308; 28 Fed. Cases, 604.

And in this case Judge Story quotes with approval the opinion of Vattel respecting the enforcement of rights against a sovereign, as follows:

"If there exists any difficulty on this account, it is equally conformable to prudence, to the delicacy of sentiment which ought to be conspicuous in a sovereign, and to the love of justice, to cause them to be decided by the tribunals of the State. This is the practice of the States that are civilized and governed by laws."

As to the Joinder of the Secretary of the Treasury.

This suit cannot be regarded as one against the State of Massachusetts because of the joinder of the Secretary of the Treasury as a defendant. Mr. Cotton does not seek to compel the Secretary of the Treasury to pay over to him any funds of the State of Massachusetts or to restrain the Secretary from paying to that State any sum that may be justly due to it by the United States. The suit is simply and solely an action to prevent the Secretary from doing or attempting to do anything that will disturb Mr. Cotton's lien upon the warrant in his possession. The case does not come within the principle announced in *United States v. Guthrie* (17 How., 284), that "no court has the power to command the

withdrawal of money from the Treasury of the United States to pay any individual claim whatever." This is an action to restrain the Secretary of the Treasury from violating a ministerial duty and attempting to do a ministerial act which he has no authority under the law to do.

Under the act of Congress approved July 27, 1861, the Secretary of the Treasury was directed—

> "* * * out of any money in the Treasury not otherwise appropriated *to pay to the governor of any State, or to his duly authorized agent*, the costs, charges and expenses properly incurred by such State for enrolling, subsisting, clothing, supplying, arming, equipping, paying and transporting its troops employed in aiding to suppress the present insurrection against the United States to be settled upon proper vouchers to be filed and passed upon by the proper accounting officers of the Treasury."

Every requirement of this explicit and comprehensive statute had been fully met and complied with before the Secretary of the Treasury was authorized to perform any act relating to the payment of the amount found due. After the amount due to the State of Massachusetts had been ascertained and settled upon proper vouchers, nothing but a ministerial duty remained to be performed by the Secretary namely, that of issuing a warrant upon the Treasurer of the United States to the governor or to his duly authorized agent.

United States *v.* Jordan, 113 U. S., 418.

United States *v.* Louisville, 169 U. S., 249, 255.

Roberts, Treasurer, *v.* United States, 176 U. S., 221, 230.

In the last case the court said, speaking of the act of Congress therein involved:

> "There is but one act of Congress to be examined, and it is specially directed to the Treasurer. We think its construction is quite plain and unmistakable. It directs the Treasurer to pay the interest on the certificates which had been redeemed by him, and the only question for him to determine was whether these certificates had been redeemed within that meaning of that act. That they were, we have already attempted to show, and the duty of the Treasurer seems to us to be at once *plain, imperative, and entirely ministerial*, and he should have paid the interest as directed in the statute."

With the act of delivering the warrant to Mr. Cotton, terminated not only all manner of responsibility upon the part of the Secretary of the Treasury relating to the payment, but also completely ended his authority in the matter. Upon the delivery of this warrant to Mr. Cotton the Secretary of the Treasury became, with respect to this transaction, *functus officio*.

Had the Secretary at the request of ex-Governor Bates issued a new warrant he would not only have destroyed Mr. Cotton's lien upon the warrant already issued, but would have committed an act for which there was no authority in law.

This court has repeatedly held that any one who sustains personal injury by the refusal of an executive officer to comply with his duty may have a writ of mandamus to compel him to perform his duty, or when such duty is about to be violated by some positive ministerial act for which there is

no adequate compensation at law he may have an injunction to prevent it.

> Board of Liquidation *v.* McComb, 92 U. S., 531, 541.
> Noble *v.* Logging Co., 147 U. S., 165, 172.

Furthermore, the Secretary of the Treasuary derives his power to issue duplicate warrants from section 3646 of the Revised Statutes as amended by the act of 1885, which reads as follows:

> "Whenever any original check is lost, stolen, or destroyed, disbursing officers and agents of the United States are authorized, after the expiration of six months, and within three years from the date of such check, to issue a duplicate check; and the Treasurer, assistant treasurers, and designated depositaries of the United States are directed to pay such duplicate checks, upon notice and proof of the loss of the original checks, under such regulations in regard to their issue and payment, and upon the execution of such bonds, with sureties, to indemnify the United States, as the Secretary of the Treasury shall prescribe. This section shall not apply to any check exceeding in amount the sum of twenty-five hundred dollars."

This section limits the right to issue a duplicate warrant to cases where the original has been lost, stolen, or destroyed, and only then in cases where the amount does not exceed $2,500. It is also possible that the Secretary might have the power to correct a clerical error in a warrant which had been erroneously made out, but that is not this case. The warrant was properly made out and properly delivered in accordance with the statute that authorized the payment.

The Abatement of the Suit as to the Defendant Bates.

The court will probably take judicial cognizance of the fact that the defendant Bates relinquished his office as governor of Massachusetts, and that his successor, Governor Douglas, assumed the duties of that office on or about the 6th day of January, 1905, subsequent to the day when the rule in this case was issued. Under the decisions of this court in *Warner Valley Stock Company v. Smith* (165 U. S., 28) and *Murphy v. Utter* (186 U. S., 95), the action sought to be prohibited, so far as Bates is concerned, has therefore abated and cannot be revived against his successor in office.

We think we have shown the contention that this is a suit affecting the property of the State, and therefore a suit against the State, to be without merit. The only remaining ground for asserting that it is a suit against the State grows out of the joinder of the defendant Bates in his individual or official capacity. The only object in joining Mr. Bates was to prevent him as an individual clothed with gubernatorial powers from doing an act to the injury of Mr. Cotton. Now that he has been shorn of his official power his capacity for injury is at an end, and, under the decisions above referred to, his connection with the litigation is terminated and the suit cannot be revived against his successor in office. With the passing of Mr. Bates disappears the only remaining objection which can be interposed to the jurisdiction of the court below.

It is respectfully submitted that the prayer of the petition of the Commonwealth of Massachusetts should be denied.

FREDERIC D. MCKENNEY,
JOHN S. FLANNERY,
WILLIAM HITZ,
WILLIAM FRYE WHITE,
Attorneys for ~~John D. Collon.~~
Respondents